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No. 500

In the Supreme Court of the United States

OCTOBER TERM, 1958

THE CROWELL-COLLIER PUBLISHING CO., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
[redacted]
Assistant Attorney General,
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HARRY MARSELLI,
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Department of Justice, Washington 25, D. C.

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OPINIONS BELOW

The opinion of the Tax Court (R. 3057a–3080a) is reported at 25 T. C. 1268. The opinion of the court of appeals (Pet. 29–41) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1958. The petition for a writ of certiorari was filed on November 6, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the amount of excess profits tax relief granted by the Tax Court under § 722 of the Internal Revenue Code of 1939 may be reviewed by the court

of appeals for an alleged inconsistency with or lack of supporting findings, notwithstanding the provision of § 732 (c) of the Code that the determination of any question made "necessary solely by reason of * * * section 722 * * * shall not be reviewed or redetermined by any court or agency except the Tax Court."

STATUTE INVOLVED

Section 732 (c) of the Internal Revenue Code of 1939 (as added, 55 Stat. 17, and amended, 26 U. S. C. (1952 ed.) 732 (c)):

> (c) *Finality of Determination.*—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711 (b) (1) (H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Tax Court.

STATEMENT

In proceedings before the Tax Court to review a determination of the Commissioner, petitioner sought, among other things, relief under § 722 of the Internal Revenue Code of 1939 from excess profits taxes for 1943–1945. The Tax Court found that petitioner's "average base period net income" was "an inadequate standard of normal earnings" (§ 722 (b)) both because of its discontinuance during the base period of publication of the unprofitable magazine "Country Home" and because of its change during the base period from the letter-press to the gravure method of printing. Having found that petitioner

qualified for relief under § 722, the Tax Court determined, "upon a consideration of the entire record" (R. 3072a), that a "constructive" increase of $518,000 in petitioner's average base period net income was warranted in order to arrive at "a fair and just amount representing normal earnings to be used as a constructive average base period net income" (§ 722 (a)) in arriving at petitioner's "excess profits credit" for the taxable years involved (R. 3056a).

On petition for review to the court of appeals, petitioner contended, so far as is relevant here, that the evidentiary facts found by the Tax Court showed that it was entitled to an adjustment to base period net income of more than $518,000 (at least some $823,000); that the Tax Court's ultimate finding that the $518,000 increase produced a "fair and just" base period income was inconsistent with its evidentiary findings; and that the Tax Court made no findings showing how its reconstruction had been arrived at. The court of appeals held that these contentions related exclusively to determinations made "necessary solely by reason of * * * section 722" within the meaning of § 732 (c) and hence were not reviewable on appeal (Pet. 36). It also rejected petitioner's contention that § 732 (c) of the 1939 Code had been repealed by the 1954 Code (Pet. 34–35). On the remaining questions, not relevant here, the court either declined jurisdiction or affirmed the decision of the Tax Court (Pet. 32, 36–40).*

*On one of these questions—the validity of the regulations establishing the "variable credit rule"—it is not clear on what basis the court acted. The Commissioner had argued that re-

DISCUSSION

Petitioner contends that the court of appeals, in refusing to determine whether the Tax Court's ultimate finding on the amount of relief was inconsistent with or unsupported by its evidentiary findings, reached a decision in conflict with that of the Court of Appeals for the Ninth Circuit in *Helms Bakeries* v. *Commissioner,* 236 F. 2d 3 (App. C, Pet. 42–55). The questions presented here are substantially identical to those presented in the petition for a writ of certiorari now pending in *Brown Paper Mill Co.* v. *Commissioner,* No. 351, this Term. For the reasons stated in the Memorandum for the Respondent filed in that case, the Commissioner would not oppose a grant of certiorari to resolve a subsisting conflict with the *Helms* case. As suggested there, however, the Court may wish to continue both this case and No. 351 on its docket pending the decision of the Ninth Circuit on a second appeal in the *Helms* case. (*Helms Bakeries* v. *Commissioner,* 28 T. C. 79, appeal pending, No.

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view of that question, like those involved here, was barred by § 732 (c). The court, although agreeing generally with the Commissioner's contention that questions relating solely to § 722 relief issues were nonreviewable (Pet. 36), nevertheless proceeded, without comment on the § 732 (c) problem, to show that the challenge to the regulations was without merit (Pet. 38–40). In light of its earlier broad statement adopting the Commissioner's view, it seems unlikely that the court intended to hold *sub silentio* that the validity of regulations applicable exclusively to § 722 claims could be reviewed notwithstanding § 732 (c). It is perhaps more likely that the court intended its comments only by way of dictum—to show that the question, though nonreviewable, was in any event without merit. Whatever the explanation may be, however, no question concerning that issue is presented here.

15,574, C. A. 9), in which that court has been asked to overrule its earlier decision and thus resolve the existing conflict.

Respectfully submitted.

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